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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

74-482

No. 73-1495

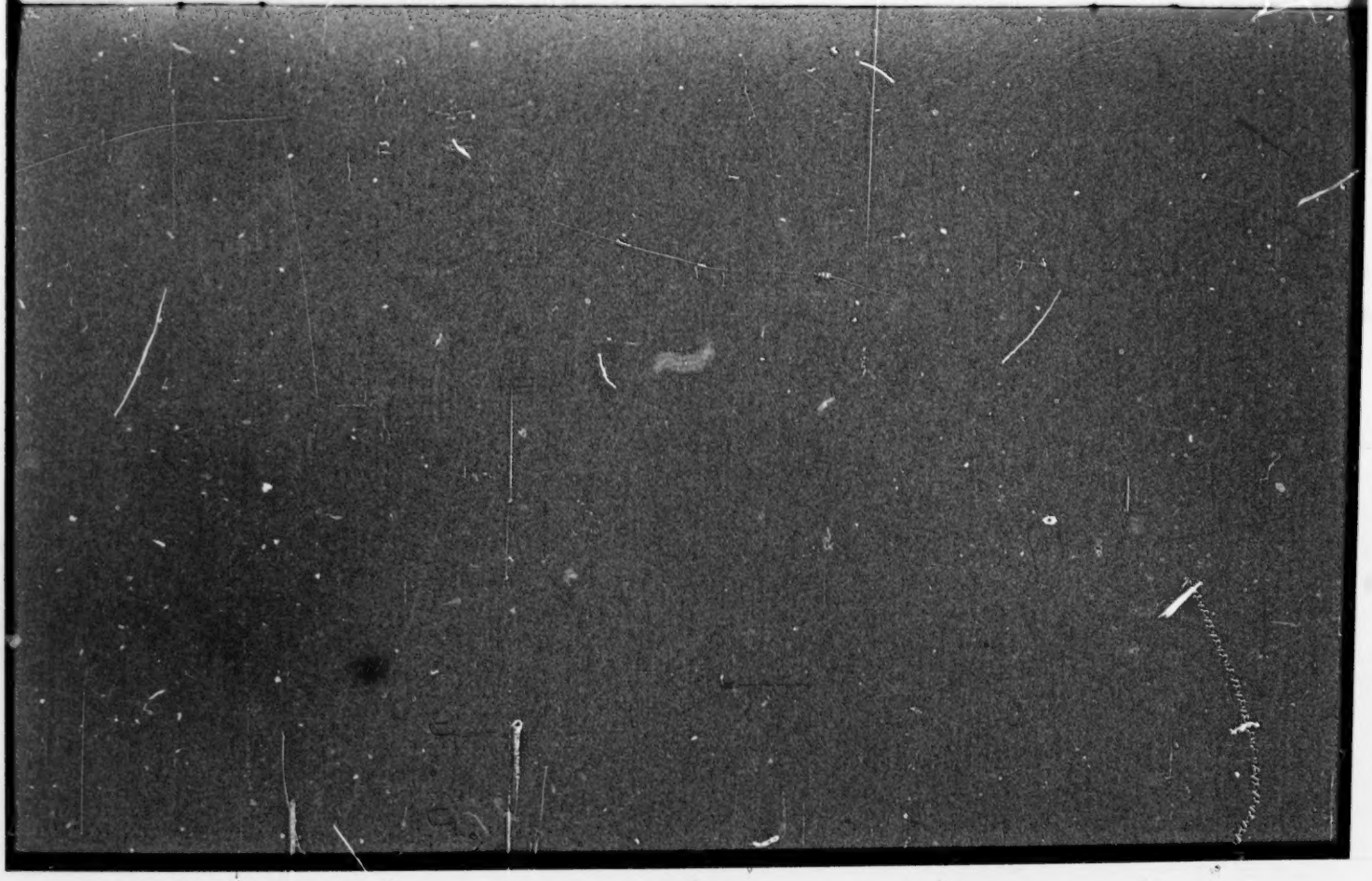
J. R. CESSNA,
Petitioner-Appellant,
v.
THOMAS L. McQUAID, Trustee in Bankruptcy for Federal Shopping Way, Inc.,
Trustee-Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE NINTH CIRCUIT

J. R. CESSNA,
Attorney pro se

Office and Post Office Address:
810 Third Avenue
Seattle, Washington 98104

CRAFTSMAN ◆ SEATTLE, WASHINGTON



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1495

J. R. CISSNA,
Petitioner-Appellant,
v.
THOMAS L. McQUAID, Trustee in Bankruptcy for
Federal Shopping Way, Inc.,
Trustee-Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE NINTH CIRCUIT

The Petitioner, J. R. Cissna, prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit affirming a District Court (Rehearing denied July 2, 1974). This Default Judgment for $310,093.66 was rendered as a sanction for a 20 day tardiness in completing a set of over 150 Interrogatories. There was no Hearing on the Merits. The Petitioner maintains the sanction is based on a frivolous *derivative* claim and there is *no primary judgment* nor valid primary claim.

OPINIONS BELOW

Original Default Judgment Opinion of the District Court for the Western District of Washington

The original *Default Judgment* of the United States District Court for the Western District of Washington at Seattle carries a nine line recital that it is entered for "failure to answer interrogatories within the time specified . . ." It appears herein as *Appendix A*, and was not reported.

Original Order Denying Motion to Vacate of the District Court of the Western District of Washington

The *"Order Denying Motion to Vacate"* carries a 13 line recital including "even though due notice was not given of said Motion (sic) as required by the Federal Rules of Civil Practice . . ." referring to *Rule 77(d)*. It appears herein as *Appendix B*, and was not reported.

Opinion of the Ninth Circuit Court of Appeals of the United States

The Opinion of the Ninth Circuit Court of Appeals was requested by the Court not to be published. It appears herein as *Appendix C*.

The United States Court of Appeals affirmed the $310,093.66 Default Judgment as a Sanction for tardiness under Fed. R. Civ. P. 37(b)(c).

The Court ruled the *amount* of the Judgment of $310,-093.66 for tardiness did not make the Judgment void. citing *Transworld Airlines, Inc. v. Hughes*, 449 F.2d 51 (2d Cir. 1971).

Petition for Rehearing Denied July 25, 1974 — Appendix D

JURISDICTION

(i) The Opinion of the United States Court of Appeals

for the Ninth Circuit was initially entered *June 11, 1974.*

(ii) The Rehearing was Denied *July 25, 1974.*

(iii) The jurisdiction of this Court is Invoked under 28 U.S.C. § 1254.

QUESTIONS PRESENTED FOR REVIEW

1. *Is a Sanction of $310,093.66 for an Innocuous Tardiness just?*

Does a Sanction of $310,093.66 for failure to complete 150 interrogatories "within the time specified" but furnished prior to the Hearing on the Default qualify as a "just order" under Fed.R.Civ.P. Sec. 37(b)(2)(c)?

2. *Is this Default Judgment Constitutional in light of the Fifth Amendment?*

Under the facts is such a Sanction Default Judgment for $310,093.66 valid where *no* Hearing *on the Merits* in *any* form was ever held?

3. *Is the Amount of $310,093.66 not an "Excessive Fine" Under the Eighth Amendment?*

Is the *amount* of the Sanction of $310,093.66 for a tardiness a Constitutional exercise of the District Court's authority in light of the Eighth Amendment making unconstitutional "an *excessive* fine"?

4. *Appeal Procedure Under Rule 60(b)4.*

Where the Clerk failed to give the Defendant Notice of the Entry of the Default Judgment, and failed to make a Docket Entry in respect thereto, as required by *Rule 77(d)* until after the time for appeal had expired, and the Defendant was in Illinois, was a Motion to Set Aside the

Judgment under *Rule 60(b)*, and upon being denied taking an appeal therefrom, the proper procedure?

5. *Does Argument of Counsel Constitute "Evidence" Under Rule 10(b)* requiring it be transcribed in order to create a Record permitting Appellate review of a District Court denial of a Motion to Vacate under *Rule 10(b)*?

CONSTITUTIONAL PROVISIONS AND COURT RULES INVOLVED

Due Process — Amendment V

1. Article V of the Amendment to the Constitution of the United States provides:

> "... nor be deprived of life, liberty, or property, without *due process* of law; nor shall private property be taken for public use, without just compensation."

Excessive Fines Cannot be Imposed — Amendment VIII

2. Article VIII of the Amendment to the Constitution of the United States provides:

> "Excessive bail shall not be required, nor *excessive fines imposed*, nor cruel and unusual punishments inflicted."

Fed. R. Civ. P. 37 — Failure to Make Discovery; Sanctions

> "(2) *Sanction by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are *just*, and among others the following:
>
> "(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is

obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;"

Fed. R. Civ. P. 55 — Default

"Rule 55 RULES OF CIVIL PROCEDURE
"DEFAULT"

"(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

"(2) *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to *establish the truth* of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States."

Fed. R. App. P. 10(b) — Transcript of Proceedings

"The Transcript of Proceedings

"Rule 10(b)

"(b) THE TRANSCRIPT OF PROCEEDINGS; DUTY OF APPELLANT TO ORDER; NOTICE TO APPELLEE IF PAR-

TIAL TRANSCRIPT IS ORDERED. Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the *evidence,* he shall include in the record a transcript of all *evidence* relevant to such finding or conclusion. Unless the entire transcript is to be included, the appellant shall, within the time above provided, file and serve on the appellee a description of the parts of the transcript which he intends to include in the record and a statement of the issues he intends to present on the appeal. If the appellee deems a transcript of other parts of the proceedings to be necessary he shall, within 10 days after the service of the statement of the appellant file and serve on the appellant a designation of additional parts to be included. If the appellant shall refuse to order such parts, the appellee shall either order the parts or apply to the district court for an order requiring the appellant to do so. At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript."

STATEMENT OF THE CASE

Abbreviations

"R." shall designate "Record" herein.

There is no transcript, since there has never been a Hearing on the Merits, and all evidential facts have been submitted by Affidavit or Response to Interrogatories.

The *$310.093.66* Default Judgment is predicated on a derivative claim. Both primary and derivative claims are alleged to be frivolous (R. 64). This Sanction is for failing "to answer interrogatories within the time specified" (R. 62). No prejudice is claimed by reason of the 20 day

tardiness. Answers to over 150 interrogatories were served prior to the Hearing on the Motion seeking the Sanction (R. 37 through 61) together with an Affidavit showing impossibility to be more prompt (R. 31 through 36). This Default Judgment deprived the Defendant of *any* Hearing on the Merits of any kind (R. 80 through 82—being the complete Certified Docket).

The Petitioner, a member of the bar for 40 years, by his Responses to Interrogatories and the Affidavit shows with specificity the frivolity of *all claims* both derivative and as to those alleged as against the *primary* corporate obligor totalling the $310,093.66 (R. 37 through 61). There is no *primary* corporate Judgment (R. 82).

Primary Corporate Claim

No competent witness by affidavit or otherwise has substantiated the claim of $310,093.66. For example, *$218,513* of the principal on which the $310,093.66 (a) derivative, (b) Sanction, (c) Default Judgment is based, is a letter filed with the Internal Revenue *Dec. 16, 1963*. This is *six and one half years* before this suit was filed. The letter from United States Projector acknowledges the four agency corporations of Federal Old Line (not Federal Shopping Way of which McQuaid is Trustee) had in *1963 pre-paid* for projectors and AV equipment $218,513.91. *Uncontroverted* by the Record is the fact all equipment was delivered shortly after a pending S.E.C. matter was concluded (April 1964)* resulting not only in full payment of every cent pre-paid but "such deliveries far exceeded any debt, and Federal Shopping Way still would owe a large sum. . . ." (R. 42, l. 25) but for the joint venture relationship and "possibility of Federal Shopping Way

discharging its huge obligation to United States Projector in the form of stocks and bonds in Federal Shopping Way...." (R. 42, ll. 29 & 30).

Derivative Liability

This *derivative* Default Judgment is based on a corporate director claim under a repealed Statute. A contingent liability was incurred unless certain filings were made. Error in the form of filing in 1958 is claimed (R. 26). The Appellee McQuaid contends the filing made 12 years prior to this action, was not "an affidavit of paid in capital" but was "an affidavit of capital to establish the amount of corporate license fee" (R. 27, ll. 21 through 28). Interrogatory Answers shows paid-in capital in fact "far exceeded" stated capital (R. 38, l. 7).

Cooperation by Recusant

> "That this defendant maintained office space adjoining Trustee McQuaid and his predecessor for two years immediately following the seizure of these properties by the Court. That he was available at any time by telephone or personal interview to answer any inquiry relating to the United States Projector and obligation to or from it. That by reason of confirming his work in said office to matters related to Federal Shopping Way and receiving no income therefrom, but on the contrary having to spend over $100,000.00 in the discharge of obligations from which he had at no time received personal benefit, he was obliged during 1971 to accept out-of-state opportunitites to provide for his family and absolute necessities."

Responses to the Plaintiff's Interrogatories, which were provided prior to the hearing on the Default concluded with the following request:

> "Cissna, will welcome supplemental interrogatories preferably by phone as the time and stenographic

cost in preparing such answers is extremely burdensome and interfering with much more important matters that should be attended to if the creditors' and stockholders' rights are to be protected and preserved." (R. 61)

District Court's Clerk's Office Omits Notice of Default Judgment — Fed. R. Civ. P. 77(d)

No appeal was taken from the original Default Judgment because no Notice was mailed nor Entry noted on the Docket until after the time for appeal had expired. The Defendant was living temporarily in Illinois, 2000 miles from the Clerk's office in Seattle during that period. There was violation of Rule 77(d) by someone in the Clerk's office as the District Court's recital in the Denial of "Granting the Motion to Vacate" acknowledged stating "even though due Notice was not given as said Motion (sic, - viz. "Judgment") as required by the Federal Rules of Civil Practice . . . the requisite showing . . . has not been made . . ." (R. 76).

Appeal Taken From Order Denying Motion Under Rule 60(b) Particularly (4)

From *this Order* the Petitioner appealed to the Ninth Circuit Court of the United States, under *Rule 60(b)*, and especially *Rule 60(b)4*, on the basis the Judgment was void as

(a) Not a "just" Order as required by *Rule 37*;

(b) An "excessive fine" under Amendment VIII; and

(c) Since there was *no* "Day in Court" on the *Merits* of *any* kind, there was a violation of Amendment V.

The Appellant Court (9th Cir.) held:

(a) *"The large amount of the Judgment"* under Fed.

R.Civ.P. 37 (b)(2) for tardiness ". . . *does not make the judgment void. See Transworld Airlines, Inc. vs. Hughes*, 449 F. 251 (2nd Cir. 1971), reversed on other grounds, 409 U.S. 363 (1973)".

(b) The Opinion of the Appellant Court recites "no appeal was taken" but omits the reason therefore.

REASONS FOR ALLOWANCE OF THE WRIT

1. Departure From the "Accepted and the Usual"

This Default Judgment for $310,093.66 for an inconsequential tardiness and its affirmation by the United States Court of Appeals of the Ninth Circuit in sanctioning such a departure, so far departs from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision.

The United States Court of Appeals (9th Cir.) relies on the case of *Transworld Airlines, Inc. v. Hughes*, 449 F.2d 51 (2d Cir. 1971), *reversed on other grounds*, 409 U.S. 363 (1973). That decision is essentially not an exercise of any direct *sanction* power under *Rule 37(c)* but a finding on the merits due to an adamant refusal to supply evidence which in affect becomes an *evidential* circumstance that invited a judgment by default on that particular issue.

Throughout the Hughes matter the Court bent over backwards to give opportunities over and over again to supply the requested information ". . . as far as we know defendants have never in the eight years since the default judgment, represented that Hughes was willing to be deposed were the default vacated . . ."

In total contrast is the Record in this case. Uncontro-

verted is the Affidavit of the Petitioner demonstrating a continuing affirmative desire to provide any discovery within his capacity (R. 31 & 32).

No case including the *Hughes* case, has involved a tardiness where there was a total willingness to comply. The *Hughes* case is an adamant eight year refusal to provide available information on key issues. In fact the following language of that case; at page 61,

> "The sanction or judgment by default for failure to comply with discovery orders is the most sever sanction a Court may apply, and its use must be tempered by the careful exercise of judicial discretion to assure that its imposition is merited. However, where one party has acted in willful and deliberate disregard of reasonable and necessary Court orders and the efficient administration of justice, the application of even so stringent a sanction is fully justified and should not be disturbed".

"The Accepted and Usual"

An erudite and thorough analysis of the "accepted and usual courses in this type of judicial proceeding"; in the Section 37 discovery sanction authority situation appears in the Harvard Law Review article entitled "The Imposition of Discovery Sanctions" 74 Harv. L. Rev. at 949 reads:

> "One of the primary aims of procedural reform has been *to diminish* the possibility of a judgment for procedural *defaults*, such as discovery non-compliance and to ensure that most cases are decided on their merits. . . . Even where there has been clear non-compliance by failure to appear . . . the recusant is usually allowed at least one more opportunity to appear if there is any indication that the information may be forthcoming. These second chances are most frequently given by means of a conditional order, imposing a sanction for default *unless* the recusant party supplies the required information".

In the recent 1970 case of *McFarlane v. Gregory*, 425 F.2d 443 where there were serious difficulties in obtaining responses (the Court reversed a $7,114 penalty solely on the basis of the amount stated)

> "Nevertheless, considering the size of the penalty ($7,114) we are constrained to conclude the trial court should have afforded the defendants an opportunity of a hearing on the scope and cost of their default before imposing a proper remedy therefore."

The footnote reads pertinently as follows:

> "Compared with other cases in which a sanction has been imposed under *Rule 37(b)*
>
> *Hendricks v. Alcoa S.S.*, 32 FRD. 169 (1963) $850.00
> *Austin Theaters v. Warner*, 22 FRD. 302 (1958) $50.00
> *Bernat v. Penn. Ry.*, 14 FRD. 465 (1953) $50.00."

No one of these cases includes a proceeding where the recusant actually provided the information as was done here; nor do these cases involve imposing a judgment for the total claim.

2. This Decision Is in Direct Conflict With the Societe Internationale, the 357 U.S. Case, the Petitioner Submits

The case of *Societe Internationale etc. vs. Rogers*, 357 U.S. 197, at page 209 explains the limits of power of a District Court where it transgresses a Constitutional vested right.

> "The provisions of Rule 37 which are here involved must be read in the light of the Fifth Amendment that no person shall be deprived of property without due process of law, and more particularly against the opinions of this Court in *Hoven vs. Elliott*, 167 U.S. 409, 17 S.Crt. 841, and *Hammond Packing Company vs. The State of Arkansas*, 212 U.S.322, 29 S.Crt. 370. These decisions established that there are constitu-

> tional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity of a *hearing on the merits* of his cause.... In *Hoven vs. Elliott, supra,* it was held that due process was denied a defendant whose answer was struck, thereby leading to a decree pro confesso without a *hearing on the merits,* because of his refusal to obey a court order pertinent to the suit."

While the cited case has the effect of protecting a *plaintiff* in having his contentions "heard on the merits" it would seem there would be argument even stronger for insisting on a *defendant* who has provided the Court sworn details, as to his defense being also allowed his *day in Court on the merits.* A hearing on the merits would be particularly necessary where the Plaintiff has undertaken to claim a derivative judgment, under a repealed law where there is no primary judgment and the Record by Affidavit shows the Plaintiff has no valid claim either on the *primary* obligation nor the *derivative* claim.

The Eighth Amendment makes any "imposing of an excessive fine" unconstitutional.

CONCLUSION

For the foregoing reasons the lower Court Judgment should either be summarily reversed or a Writ of Certiorari should be granted.

Respectfully submitted,

J. R. Cissna,
Attorney pro se

APPENDIX A

[Filed in the U.S. District Court, Western Washington, Dec. 20, 1971, Charles A. Schaaf, Clerk, By R, Deputy.]

Hall Baetz
Davis, Wright, Todd, Riese & Jones
4200 Seattle-First National Bank Bldg.
Seattle, Washington 98154
MAin 2-3150

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THOMAS L. McQUAID, Trustee of Federal Shopping Way, Inc., *Plaintiff*, v. J. R. CISSNA, et al., *Defendants.*	No. 61609 DEFAULT JUDGMENT

Upon the foregoing motion for entry of judgment by default, it appearing that defendant J. R. Cissna failed to answer interrogatories within the time specified by law and failed to comply with the order of this court dated November 3, 1971, ordering the defendant J. R. Cissna to file and serve answers to interrogatories within fifteen days of the date of that order; and the court having heard argument of counsel for plaintiff and argument of defendant J. R. Cissna; and the court having considered the affidavit of J. R. Cissna it is therefore

ORDERED that plaintiff Thomas L. McQuaid, trustee of Federal Shopping Way, Inc., is hereby granted judgment by default against defendant J. R. Cissna in the amount of $310,093.66 with interest and costs, as prayed for in plaintiff's complaint

DONE AND ORDERED this 20th day of December, 1971.

United States District Judge
/s/ W. D. Murray

Presented by
Hall Baetz
of DAVIS, WRIGHT, TODD, RIESE & JONES
Attorneys for Plaintiff

APPENDIX B

[Filed in the U.S. District Court, Western Dist. of Washington, Jan. 17, 1973, Edgar Scofield, Clerk, By J.T., Deputy.]

Hall Baetz
Davis, Wright, Todd, Riese & Jones
4200 Seattle-First National Bank Bldg.
Seattle, WA 98154
MA 2-3150

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THOMAS L. McQUAID, Trustee of Federal Shopping Way, Inc., *Plaintiff*, v. J. R. CISSNA, et al., *Defendants.*	No. 61609 ORDER DENYING MOTION TO VACATE JUDGMENT

This matter having come on for hearing at 9:30 a.m., on Friday, December 15, 1972, before the undersigned judge of the above entitled Court; and the Court having heard argument on defendant Cissna's motion to vacate judgment even though due notice was not given of said motion as required by the Federal Rules of Civil Procedure; and the Court being of the opinion that there has been no showing as required under Rule 60(b) of excusable neglect, surprise, mistake, fraud, misrepresentation, misconduct of the adverse party, or other grounds for vacation of the judgment heretofore entered; and the Court being of the opinion that the requisite showing under Rule 60(b) for vacating of judgment has not been made; now, therefore, it is hereby

ORDERED that defendant Cissna's motion to vacate judgment is hereby denied.

DONE AND ORDERED this 15th day of January, 1973.

/s/ W. D. Murray
United States District Judge

Presented by:
Hall Baetz
of Davis, Wright, Todd, Riese & Jones
Attorney for Plaintiff

APPENDIX C

[June 11, 1974]

No. 73-1495

Appeal from the United States District Court
for the Western District of Washington

MEMORANDUM

Before: KOELSCH and WALLACE, Circuit Judges,
and SKOPIL,* District Judge.

The district court rendered a judgment in the amount of $310,093.66 against Cissna on December 20, 1971, as a result of his failure to comply with a discovery order. Fed.R.Civ.P. 37(b)(2)(C). No appeal was taken. On December 13, 1972, Cissna moved to have the judgment vacated pursuant to Rule 60(b). From a denial of that motion, this appeal was taken. We affirm.

The order of the district judge is tested by whether or not Cissna has made a "clear showing of abuse of discretion." *See Farmers Co-Operative Elevator Ass'n Non-Stock v. Strand*, 382 F.2d 224, 232 (8th Cir.), *cert. denied* 389 U.S. 1014 (1967). This Cissna has failed to do.

In argument, he primarily contended that the judgment is void under subsection (4) of Rule 60(b) on the basis that there was no adequate hearing, his due process rights were violated and the judgment was a penalty.

However, Cissna failed to provide us with a record upon which he could attempt to prove his contentions. Fed.R. App.P. 10(b). *See Hemming v. United States*, 409 F.2d 11 (5th Cir. 1969); *Springer v. Best*, 264 F.2d 24 (9th Cir. 1959). Based upon what record is before us, we know there was a hearing in which Cissna was not only present, but, as a lawyer, he argued his own cause. There is no showing that he did not have ample opportunity to develop his case. Clearly, his lack of adequate hearing and due process arguments are without merit.

The penalty argument refers to the large amount of the judgment. But this does not make the judgment void. *See Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51 (2d Cir. 1971), *rev'd on other grounds*, 400 U.S. 363 (1973).

Essentially, any of Cissna's argument which might have any merit would have been appropriately considered had he appealed from the judgment. In this appeal, we do not review the judgment. 7 J. Moore, Federal Practice ¶60.30[2], at 423 (1974). Although we are sympathetic with his plight due to the amount of the judgment, we are bound to review the order from which Cissna appealed under the clear abuse of discretion test. Cissna has not met this substantial burden.

His remaining arguments are without merit.

AFFIRMED.

APPENDIX D

[Filed July 25, 1974, Emil E. Melfi, Jr., Clerk, U.S. Court of Appeals.]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS L. McQUAID, Trustee of Federal Shopping Way, Inc., *Plaintiff-Appellee,* v. J. R. CISSNA, et al., *Defendants-Appellant.*	No. 73-1495 ORDER

Before: KOELSCH and WALLACE, Circuit Judges, and SKOPIL,* District Judge

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R. App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

*Honorable Otto R. Skopil, United States District Judge, District of Oregon, sitting by designation.